United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7475

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Appellee,

vs.

E. RENE FRANK,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Appellee,

- against -

E. RENE FRANK,

Defendant-Appellant.

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APPELLEE'S BRIEF

COUNTER-STATEMENT OF ISSUES

1. Did not the court below properly exercise its discretion in refusing to vacate a default judgment entered against Appellant as a result of his failure to obey a court order and otherwise defend the action, where Appellant failed to show a valid excuse for his default or a meritorious defense and otherwise failed to move quickly to correct his default despite service upon him of notice of all proceedings both before and after entry of judgment?

2. Is not Appellant properly chargeable with contempt for ignoring notices and an order of the court duly served upon him, to appear for a deposition in aid of enforcement of the judgment entered against him?

COUNTER-STATEMENT OF THE CASE AND FACTS

This appeal is from two orders of Judge Ward entered July 21, 1975: the first denying Appellant's motion to vacate a default judgment entered against him; and the second denying Appellee's motion to adjudge Appellant in contempt upon condition that Appellant appear for an examination in aid of enforcement of said judgment within the therein stated period of time.* (A.-8, 9)** In denying Appellant's motion

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* Appellant misstates or misconstrues the court's decision on the contempt application. The court below did not grant, but rather, conditionally denied, said motion. Since no contempt order has yet issued, that branch of the appeal is premature and, it is respectfully urged, should be dismissed out of hand.

**All such references are to the joint appendix. References designated by the letter "R" refer to the record on appeal.

to vacate, the District Court specifically found (i) that there was no valid excuse for his default, (ii) that no meritorious defenses were shown, and (iii) that Appellant waited an inordinately long time before moving to vacate. (A.-8)

The primary question on this appeal is a relatively narrow one, to wit: whether the District Court properly exercised its discretion in refusing to vacate the default judgment. Rather than address himself to this issue and face the record of his clear, continuous and contumacious failure to defend this action, Appellant has instead virtually abandoned his position below — that "purported" settlement negotiations "lulled" him into thinking that no further proceedings would take place — and attempts for the first time on this appeal to argue that despite the numerous notices concededly served upon him both before and after his default (which he chose to ignore for one reason or another), he had no opportunity to defend and was deprived of due process. Further, and again for the first time on this appeal, Appellant

argues that the amount of the judgment is inflated and not supported by the record.* However, as hereinafter shown, the record discloses that Appellant had numerous opportunities to act but failed to do so; and that the judgment entered against him was proper in all respects. His arguments on this appeal, when viewed within the context of the numerous notices served and the history of delays at his hands, are, we submit, simply incredulous and solely dilatory.

The Facts

On October 18, 1974, this Court, on Appellee's motion, entered judgment upon Appellant's failure to defend this action. The judgment, in pertinent part, awarded to Appellee the approximate sum

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* Not only was such issue not raised below, no evidence was offered in support thereof. While that fact alone raises serious questions as to Appellant's standing to raise it now, in all events, as noted, the evidence of record fully supports the amount awarded.

of $180,000 which, including interest, represented amounts converted by Appellant as alleged in the third cause of action of the amended complaint, and amounts due and owing to Appellee for the years 1972-1974, under the terms of Appellant's guaranty agreement, as alleged in the fourth cause of action. The judgment also dismissed defendant's answer, counterclaim and third party complaint.* (A.-33)

The underlying action arose out of the sale to Appellee of an office building in Allentown,

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* While Appellant in his brief goes into a lengthy description of the allegations of the complaint, the judgment itself was entered only with respect to the third and fourth causes of action, Appellee waiving the first and second causes of action thereof. Appellee only moved for judgment on those causes of action documentarily provable, waiving its causes of action for fraud and mismanagement. The damages entered against Appellant were computed in accordance with the formula set forth in the guaranty agreement (A.-94-96, R.-4, Ex. "B") and were fully supported by financial statements prepared by Appellee's accountant (R.-28, Ex. G & H), submitted to the Court in support of the application for default judgment. The Appellant's claims that no such statements were submitted are patently wrong.

Pennsylvania, by a partnership in which Appellant was a principal. (A.-11,90)* Appellant is a self-proclaimed international real estate consultant and developer with many years experience and is a graduate of a French law school. (A.-103) The action, in four counts, sought recovery against Appellant for fraud, mismanagement, conversion and the profits which he specifically guaranteed to Appellee pursuant to the aforementioned guaranty agreement. (A.-10, R.-4, Ex. "B") Appellant appeared by counsel, to wit: Neumann, Aronson & Neumann, who represented him until July, 1974.

On July 23, 1974, the District Court granted Appellant's said counsel's motion to withdraw from the case. The Court's order directed Appellant to obtain substitute counsel or enter an appearance pro se

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* So as not to unduly expand this brief, for a full statement of the facts and the merits of Appellee's claims in the underlying action, this Court is respectfully referred to the affidavits of David G. Taylor and Steven Kriegsman submitted in support of Appellee's motion for entry of a default judgment. (A.-88,98)

within twenty (20) days of the date of the order. (R.-26) Appellant, concededly, knew of said order and yet did not comply therewith. (A.-59)* In fact Appellant did nothing** in the two-month period between the time of said order and the motion for entry of a default judgment, or thereafter*** until the motion to punish

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* This was not the first time Appellant ignored legal process or otherwise sought to delay these proceedings. After service of the Summons and Complaint, Appellant's counsel requested repeated extensions of Appellant's time to answer asserting that he was out of the country and could not be reached. After Appellee noticed the taking of Appellant's deposition, his counsel moved for an adjournment, again asserting his absence from the country. When Appellant did ultimately appear he did so only briefly, pleading illness, and did not return for some time thereafter. Further: Appellant made a motion to implead an additional third party defendant and sought to take the deposition of one of its officers, but thereafter let said motion lapse. Then virtually on the eve of trial, this matter was further delayed by Appellant's counsel's motion to withdraw.

** At the hearing before the District Court on February 14, 1975, counsel were advised that during this period Appellant communicated with the Court and sought additional time to obtain substitute counsel because illness prevented him from promptly acting in that regard. No mention of any purported settlement discussions was apparently made to the Court at that time, as no mention of any alleged illness was made to the Court below in Appellant's motion to vacate.

***By letter dated January 7, 1975 (A.-68) Appellant in part advised the Court that he "recently" learned of [continued]

him for contempt for failure to appear at a deposition in aid of enforcement of the judgment.

It was by notice of motion returnable September 24, 1974 that Appellee moved for entry of a default judgment against Appellant. Said motion, pursuant to FRCP Rule 55(b)(2) was on notice to Appellant and served upon him at his address in Marbella, Spain on September 16, 1974. (A.-101) Appellant concededly received such motion papers but did not appear, defend or otherwise communicate with counsel with respect thereto. (Appellant's Brief, p. 8, A.-102) By memorandum order dated October 8, 1974 the District Court granted Appellee's motion and directed that an order and judgment be settled on notice. Pursuant thereto Appellee served a notice of settlement returnable October 17, 1974 together with a copy of its proposed order and judgment upon Appellant. (A.-28) Again, Appellant failed to appear.

*** [continued from preceding page]
the default judgment. However, Appellant concededly received the motion papers for entry of the default judgment at least as early as October 7, 1975 (A.-102) and does not dispute receipt of the other notices sent.

Thereafter, on October 18, 1974, the aforesaid judgment was filed and entered. On October 30, 1974 a copy of said judgment together with notice of entry was served upon Appellant. (A.-32,36) Moreover, also on October 30, 1974 Appellee served upon Appellant its proposed bill of costs returnable November 6, 1974. (A.-37-39) Again, Appellant failed to appear or defend.

Further, in addition to the numerous notices served upon him by Appellee, notice of the default judgment apparently was also served by the Clerk of the District Court as required by FRCP Rule 77(d). (A.-3)

On October 30, 1974 Appellee served upon Appellant a notice to take his deposition in aid of enforcement of the judgment rendered against him, returnable on November 18, 1974, almost three weeks after service. (A.-40) Appellant failed to appear in accordance with said notice or otherwise communicate with counsel with respect thereto. In view of such default, Appellee then moved the District Court for an order directing Appellant to appear at the courthouse

for taking his deposition on January 28, 1975. Said motion was granted by order dated January 13, 1975, and service pursuant thereto was effected by air mail, special delivery. (A.-43-45) Appellant again defaulted in appearance. At that point Appellee moved by way of order to show cause to adjudge Appellant in contempt. Then, on February 14, 1975, the return date of that application, an attorney (Appellant's present counsel of record) finally appeared on behalf of Appellant and advised the Court that he intended to oppose the motion to hold Appellant in contempt and to move on behalf of Appellant to vacate the default.*

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* Though not officially of record, other counsel were apparently involved at various stages of the proceedings in Appellant's behalf. In December 1974 Appellee's counsel received a letter from an attorney named Robert J. Dinerstein who stated he represented Appellant and who inquired as to the "status" of the matter. (A.-104) After receipt of said letter he, in addition to Appellant, was furnished with the order of January 13, 1975 as well as the application and supporting papers for contempt. No further word from said counsel was forthcoming. Additionally, at the pre-argument conference with respect to this appeal, Appellant, in addition to his counsel of record, appeared thereat by one Paul Powsner, who represented himself as being Appellant's "General Counsel".

POINT I

THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION TO VACATE THE DEFAULT JUDGMENT WAS IN ALL RESPECTS PROPER AND FULLY SUPPORTED BY THE EVIDENCE OF RECORD

It is respectfully noted that the scope of this Court's review is a relatively narrow one, limited to a determination of whether or not the District Court abused its discretion in failing to vacate the default. Redar Project 6426, Inc. v. Allstate Insurance Co., 412 F.2d 1043, 1046 (2d Cir., 1969); Hand v. U. S., 441 F.2d 529 (5th Cir., 1971); Federal Enterprises Inc. v. Frank Albritten Motors, Inc., 16 F.R.D. 109 (W.D. Mo. 1954). But, moreover, when measured by any standard, it must be concluded that the District Court reached the only appropriate decision.

In order to have prevailed below Appellant had the burden of showing both a sufficient reason for his default and a meritorious defense. Gomes v.

Williams, 420 F.2d 1364 (10th Cir., 1970); Masden v. Bumb, 419 F.2d 4 (9th Cir., 1969). To the foregoing has been engrafted a third requirement: that the person seeking to set aside the default act quickly to do so. Central Operating Company v. Utility Workers of America, 491 F.2d 245 (4th Cir., 1974); United States v. Topeka Livestock Auction, Inc., 392 F.Supp. 944 (N.D. Ind., 1975) In denying Appellant's motion to vacate, the District Court found that Appellant had failed to meet any of the requirements set forth above, specifically stating that Appellant had failed: (a) to show a valid excuse; (b) to set forth meritorious defenses; and further (c) waited over four months after default before seeking to have it set aside. (A.-8) The soundness of the Court's decision as to each of the three criteria will be discussed below.

a) The lack of a valid excuse

Appellant below asserted two purported excuses for his failure to act: (i) that the District

Court was without power to enter a default judgment upon Appellant's failure to obey its order to obtain substitute counsel or appear pro se, and (ii) that he was lulled into a false sense of security by certain purported settlement negotiations which allegedly took place between the parties in Europe (also adding that he failed to receive certain of the notices sent to him).

While, as noted, supra, Appellant has now abandoned the foregoing position, a word on the lack of merit thereof may be appropriate. It was shown to the Court below that it did indeed have the power to entertain an application for and enter a default judgment for failure to obey its order to obtain substitute counsel or appear pro se. Shapiro, Bernstein & Co. Inc. v. Continental Record Co., Inc., 386 F.2d 426, 427 (2d Cir., 1967). With respect to Appellant's argument concerning the alleged settlement discussions, there was only one such discussion of extremely short duration and at no time was any settlement agreed to or was there even a suggestion that Appellee would not

continue diligently to prosecute this action. (A.-106-110) The Court below also had before it for consideration the fact that Appellant is a sophisticated businessman and law school graduate; the inconsistent position of Appellant on the one hand claiming financial inability to proceed and on the other hand asserting good faith attempts at settlement; as well as communications by Appellant with the Court wherein Appellant sought to delay, on these occasions pleading illness as his excuse. (See the footnote at p. 7, supra) Indeed, in any event, it has been held that settlement negotiations are an insufficient excuse for default. United States v. Topeka Livestock Auction, Inc., supra, 392 F.Supp. 944 at p. 950.

Thus, Appellant failed to offer a valid excuse below and offers none now. Instead, as noted, supra, Appellant urges, in what may only be viewed as a make-weight argument, that while he did indeed receive the notices sent, he had "insufficient time" to act and, as a result, his constitutional right of due process was violated. This argument not only ignores

the entirely exact and appropriate method of service in each and every instance, but also the fact that Appellant received not one, but numerous notices regarding his default (set forth in detail above), and clearly had the opportunity to take (and was never foreclosed from taking) immediate affirmative action if he so desired. Additionally, the default proceedings arose within the context of Appellant's numerous prior delays and his failure to obey a court order to obtain substitute counsel or appear pro se. (A.-74,75)*

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* The cases cited by Appellant in support of its contention are totally inapposite. (Appellant's Brief, p. 14) In Desmond v. Hackey, 315 F.Supp. 328 (D. Me., 1970) the District Court held unconstitutional a Maine statute which permitted the arrest and incarceration of a judgment debtor without any prior notice of hearing. In Armstrong v. Manzo, 380 U.S. 545 (1965) there was no attempt to advise a party to an adoption proceeding of its pendency. In Schroeder v. City of New York, 371 U.S. 208 (1962) the Court held insufficient notice by publication where the name and location of the person to be served was known. Significantly, that case held that service by mail to such person's address would satisfy constitutional due process requirements. That is exactly what was done here.

In view of the foregoing, Appellant is left to allege, in rather shrill fashion, the purported bad faith of counsel with respect to service of such notices. (Appellant's Brief,pp 14,17-18) Indeed, what the record discloses is that Appellee, in all respects and at all stages of the proceedings, complied fully with the requirements of the Federal Rules of Civil Procedure for service of papers,* and went even further

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* For example, the motion for entry of a default judgment was brought pursuant to FRCP Rule 55(b)(2), on notice to Appellant (A.-86) which Rule in pertinent part provides that the party against whom a default judgment is sought "...shall be served with written notice of the application for judgment at least three days prior to the hearing on such application..." (emphasis added) The type of service contemplated by Rule 55(b) is that pursuant to Rule 5(b) FRCP. (Moore's Federal Practice ¶ 55.05[3]) which, in pertinent part, provides that: "...service upon the attorney or upon a party shall be made by...mailing it to him at his last known address or, if no address is known, by leaving it with the Clerk...Service by mail is complete upon mailing." Appellant was concededly given eight days' notice of the motion for entry of judgment. (A.-101) Quite obviously, therefore, the papers were served well within the three-day period provided in Rule 55(b)(2) even with the addition of an extra three days for service by mail. (Rule 6, FRCP) The other papers sent to Appellant were similarly served in accordance with the Rules. (A.-27-31,32-36,37-39,40-42,43-45)

by supplying information and documents to purported "new counsel" for Appellant, although no formal appearance was then or ever entered. (See the footnote at p.10, supra)

Appellant neither disputes the fact that such papers were actually mailed nor that the address to which they were mailed was Appellant's address. Under FRCP. Rule 5(b) service by mail is complete when mailed. This Rule has been held to apply equally to both notices as well as ex parte orders. See Rifkin v. United States Lines, 24 F.R.D. 122 (S.D.N.Y., 1959); Porto Transport v. Consolidated Diesel Electric Corporation, 21 F.R.D. 250 (S.D.N.Y., 1957); In re Long Island Properties, 42 F.Supp. 323 (S.D.N.Y., 1941). Indeed, although the papers were concededly received in this case, it has been held that where or when papers are actually received is irrelevant. Kiki Undies Corporation v. Promenade Hosiery Mills, Inc., 308 F.Supp. 489, 495 (S.D.N.Y., 1969). In short, there was full compliance with all the applicable rules.

What Appellant's argument boils down to, then, is a contention that because he determined to remove himself to Spain during the pendency of this litigation, he be accorded special consideration with respect to service of papers. The Rules, however, make no distinction between a person to be served locally or in a foreign country.*

Quite obviously, however, the court's determination below was not, and our opposition to this appeal is not, based upon Appellee's technical compliance with the Federal Rules regarding service of papers. Rather, the court below found, and we here urge that, whether couched in constitutional terms or

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* Appellant attempts to make much of the fact that the motion papers to adjudge Appellant in contempt were directed to be served registered air mail, return receipt requested, and the other papers were not so served. Service of the contempt papers, however, was directed pursuant to a specific court rule, Local Civil Rule 14, and does not reflect upon the sufficiency of service of the prior papers which was made pursuant to the FRCP provisions noted above.

otherwise, Appellant had ample opportunity to be heard yet chose not to act. In effect, Appellant defaulted not once, but many times over. Yet he would urge that if he had just had longer notice he would have appeared to defend. Why, then, didn't he when the process of default, judgment and satisfaction took place over an extended period of time with extended notice? Indeed, one cannot escape the fact of the numerous notices served on Appellant, his communications with the Court, his disobedience of the Court order requiring him to obtain substitute counsel or appear pro se and the lame, incredible and inconsistent excuses offered below, all as noted above. In upholding a lower Court refusal to open a default in similar circumstances, the Second Circuit Court of Appeals observed:

> "The principal argument made below was that neither appellant's prior counsel nor appellant himself received proper notice of various steps in the proceeding. But it is clear to us — as it was to Judge Palmieri — that appellant's first attorney dropped out of the case at

> an early state and that appellant, dealing directly with plaintiff's counsel, knew about the default and inquest in the fall of 1964, well, before Judge Bonsal filed his opinion fixing damages and was aware of the default shortly after its entry in January, 1965. Nevertheless the motion to vacate was not brought until September, 1965 ..." Standard Newspapers, Inc. v. King, 375 F.2d 115, 116 (2d Cir., 1967).

Appellant's default was clearly not excusable but was a wilful and deliberate attempt at delay. It is respectfully submitted that the Courts should refuse to open a judgment where, as here, the diligent party must be protected "... lest he be faced with interminable delay and continued uncertainty as to his rights." United States v. Manos, 56 F.R.D. 655, 659 (S.D. Ohio, 1972).

b) The failure to show a meritorious defense

The Court below specifically found that Appellant had "utterly failed to allege facts demonstrating a meritorious defense." (emphasis added) (A.-8) Indeed, Appellant's papers below were wholly devoid of an affidavit of merit: they merely outlined the allegations of his answer and stated in conclusory fashion that he has a meritorious defense. (A.-61-62) Appellant argues, in essence, that that is all that is required of him (and again merely recites the allegations of his answer) but cites no case or other authority in support of such position. The law, however, is clearly otherwise. It has been expressly held that such conclusory statements are wholly deficient as an affidavit of merit. Atlantic Steamers Supply Co. v. International Maritime Supplies Co., Ltd., 268 F.Supp. 1009,1011 (S.D.N.Y. 1967). As stated by the Court in United States v. Topeka Livestock Auction, Inc., supra:

> "An absolutely essential criterion to setting aside a default entry against a defendant is that the defendant claim with specificity a meritorious defense. A conclusory statement that such a defense exists is not sufficient." (392 F.Supp. 944 at page 951) (Emphasis added)

Furthermore, at a minimum "...there should be credible factual allegations of a meritorious defense..." Residential Reroofing Union Local 30-B v. Mezicco, 55 F.R.D. 516 (E.D., Pa. 1972) No such allegations were presented to the Court below and, indeed, it is submitted, no valid defenses to this action exist.

Appellant, however, for the first time, on this appeal, attempts to create a purported defense by questioning the validity of the amount of the judgment entered against him, claiming, in essence that it was inflated. In pursuing this argument and without any support in the record, Appellant uses phrases such as "padded", "income tax evasion" and accuses Appellee of "harassment". (Appellant's Brief, p. 20) Though totally unfounded, the proper time to make such arguments should have been in the proceedings to vacate the default judgment. Significantly, Appellant introduced no evidence on this point below nor was it even adverted to in his papers.*

*What Appellant is apparently attempting to do is appeal from the judgment itself, rather than from the order denying his motion to vacate. If such is indeed Appellant's intention, the appeal, at least as to that issue, is untimely. See Weedon v. Gadon, 419 F.2d 303 (D.C.Cir. 1969)

In an apparent attempt to bridge this gap, Appellant now claims that there is no support in the record for the sum for which judgment was entered and suggests that the Court should not have accepted such amount without first requiring the Appellee to produce financial statements. Indeed, the cornerstone of Appellant's argument is that the court did not have such statements before it either with respect to the amount due and owing to Appellee under the guaranty agreement (Amended Complaint, Ex. "B", R.-4) or with respect to the amount converted by Appellant. That, however, is patently not so. In support of the damages claimed, Appellee, in its application for entry of a default judgment, annexed to such moving papers full documentation of the amounts it claimed were due and owing, which in addition to the affidavits of David G. Taylor and Steven Kriegsman, Appellee's accountant (A.-88, 98), included the very statements, by Appellee's said accountant, which Appellant claims were not, but should have been submitted. (Motion for Entry of Default Judgement, Ex. "I" and "J", R.-28)

Similarly, the claim by Appellant on page 22 of its brief that "...not a scintilla of proof was offered by Appellee..." with respect to the amount of $11,940 claimed in the third cause of action to have been converted, is equally without merit. In this connection the Court is respectfully referred to Appellee's moving papers for entry of a default judgment, Exhibit "H". (R.-28)

c) The failure to timely move to open the default

Apart from the foregoing, the Court below found equally compelling the fact that "despite written notice both before and after the entry of judgment on October 18, 1974, defendant [Appellant] did not move to vacate the judgment until February 28, 1975, over four months after it had been entered." (A.-8) Curiously, the motion to vacate was made only after Appellee had moved to punish Appellant for contempt for failure to appear at a Court ordered deposition to aid in enforcement of the judgment.

The failure of Appellant to promptly move to vacate is as crucial to his non-entitlement to relief as is his failure to show a valid excuse and meritorious defense. In Central Operating Company v. Utility Workers of America, 491 F.2d 245 (4th Cir., 1974) the Court of Appeals upheld the District Court's denial of a motion to vacate, stating:

> "The individual defendants and the local union also sought relief from the default judgment under Rule 60(b)(1) on the ground that their default was caused by inadvertent and excusable mistake and erroneous belief. The granting of relief from judgment on such grounds is a matter committed to the discretion of the district court, the exercise of which will not be disturbed on appeal absent a showing of abuse. Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573, 576 (4 Cir. 1973); Consolidated Masonry & Fireproofing v. Wagman Construction Corp., 383 F.2d 249, 251 (4 Cir. 1967). In order to obtain relief under Rule 60(b)(1), a party must show that he had an acceptable excuse for lapsing into default and that he has a meritorious defense to the action. Defendants probably made a sufficient showing on both of these points. However, delay in seeking relief from a default judgment may properly be considered by the district court in determining whether to grant such relief.

Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d at 251. Defendants waited almost four months after receiving notice of the default judgments before filing their motions to vacate. They provide no satisfactory explanation for this delay. We cannot, therefore, say that the district judge abused his discretion in relying upon the delay, characterized by him as 'inexcusable dereliction,' in denying relief from judgment. Since the district court placed primary reliance upon the factor of delay, we affirm its denial of relief under Rule 60(b)(1)."(emphasis added, 49 F.2d 252-253)

See also United States v. Topeka Livestock Auction, Inc., supra.

Finally, although Appellant pleads for his day in court, it is clear that he had ample notice and opportunity to defend this action, but chose not to do so. The alleged excuses for his default are contradictory and simply incredulous, if not insulting. One court when presented with a similar situation, resolved the matter against opening the default and stated:

"Defendant asserts it would be great injustice to deny him his day in court. He overlooks the fact that he already has

had the opportunity and full notice of many days in court, but he has voluntarily chosen to ignore completely these opportunities. A man of normal intelligence cannot avoid the effect of judicial proceedings on the incredible excuse that he was unaware of the importance of being represented by counsel. There is no indication that defendant ever attempted to ascertain in any way from anyone what he should do to assert his claimed defense.

"The history of ignoring all notices, and refusing to accept certified mail from plaintiff's attorneys, after receiving notices concerning the nature of the claim against him, indicates an utter and hostile disregard for judicial proceedings, rather than lack of knowledge. The application at this late date to attempt to assert a defense leaves grave doubt as to the good faith of the application. To permit the matter to be reopened after so long a delay would pervert judicial process and prejudice the rights of plaintiff to obtain final satisfaction of the judgment and debt owed to it." [Residential Reroofing Union Local 30-B v. Mezicco 55 FRD 516 at p. 518 (ED. Pa., 1972)]

It is respectfully submitted that Judge Ward, who has "lived" with this case since its inception and had full knowledge of all Appellant's delays and defaults as displayed by this record, acted properly in refusing to vacate Appellant's default. Indeed, to do otherwise might itself have constituted

an improper exercise of discretion. In considering this issue, the Court in Federal Enterprises, Inc. v. Frank Albritten Motors, Inc., 16 F.R.D. 109 (W.D. Mo., 1954) stated with much cogency to these facts:

> "I think that position is unsound. It does not show any equity for defendant. I do not think it shows a proper regard for legal proceedings or for judicial process. Certainly it does not show 'inadvertence' or 'excusable neglect'. It shows a succession of careless and negligent acts which amount to inexcusable, not 'excusable' neglect, and therefore it would be an abuse, not an exercise, of a 'sound judicial discretion' to set the judgment aside."

* * * *

Furthermore:

> "In considering the exercise of the discretion, courts 'must recognize at the same time, both that the objective of legal procedure is the determination of issues upon their merits instead of upon refinements of procedure, and also that litigants and their counsel may not properly be allowed with impunity to disregard the process of the court', and they must bear in mind that 'It is an abuse of discretion * * to open or vacate a judgment where the moving party shows no legal ground therefor or offers no excuse for his own negligence or default', and that, generally, it is an abuse of discretion to vacate a default judgment unless the person against whom it is rendered makes some reasonable showing that he has a meritorious defense." (16 F.R.D. 109 at p. 112)

In light of all the foregoing, it is respectfully submitted that the determination of the Court below should not be disturbed.

POINT II

APPELLANT MAY PROPERLY BE CHARGED WITH CONTEMPT FOR FAILURE TO APPEAR FOR A DEPOSITION IN AID OF ENFORCEMENT OF JUDGEMENT

In order, apparently, to give himself standing to appeal with respect to this issue, Appellant claims that the lower court granted Appellee's motion to adjudge Appellant in contempt. In fact the Court denied said motion conditioned upon Appellant's appearance for the taking of his deposition. (A.-9) In view of this, it is respectfully urged that this branch of the appeal is premature and should be dismised out of hand.

Apart from the foregoing, Appellant's substantive contentions are without merit. First, Appellant continues his purported "constitutional" argument,

claiming that the service of the papers in the supplementary proceeding upon Appellant in Spain gave him insufficient time to act. Alternatively, he then contends, in essence, that Appellant was free to ignore the deposition notice and the court order requiring him to appear upon the ground that he, a party to the action, was not tendered his travel expenses to New York.

As to the first contention, its lack of legal merit is fully discussed under Point I (a) hereof, to which the Court is respectfully referred. Of equal importance, however, is the fact that the record does not support Appellant's view of the facts.

On October 30, 1974, Appellee served a notice to take Appellant's deposition in aid of enforcement of the judgment against him. Said notice was returnable November 18, 1974, almost three weeks from service. (A.-40-42) While Appellant quibbles with such service, it is nevertheless clear that even assuming arguendo Appellant's contention that it takes at least

six days for mail to reach Spain* (Appellant's Brief, p. 24), Appellant should have received it in ample time to appear. It is undisputed, however, that he failed to so appear.

Appellant makes a similar argument with respect to the order of the Court compelling him to appear for such deposition (A.-43), but misleads the Court as to the manner of service. To the extent that it may be important, the order was not served by regular mail but rather, was served air mail special delivery. (A.-45)

But there is even more to be said. On December 2, 1974, Appellee's counsel received a letter from one Robert J. Dinerstein, Esq., who stated he represented Appellant and inquired as to the status of the action. (A.-104) By letter dated December 18,

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* Appellant offers no support for this proposition which is belied by everyday experience.

1974 Appellee's counsel advised Mr. Dinerstein of the outstanding deposition notice and Appellee's intention to apply for an order compelling Appellant to appear. (A.-105) Thereafter, the order of January 13, 1975 and the subsequent application to adjudge Appellant in contempt were, in addition to being served on Appellant, furnished to Mr. Dinerstein as well. (A.-80-81) There has been no further word from Mr. Dinerstein to date. It is thus apparent that Appellant had ample opportunity to appear, but characteristically, did not.

In support of his alternative contention that he was free to ignore the deposition notice and court order because he was not advanced travelling expenses, Appellant relies on 28 USC § 1783(a).* However, that

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* Interestingly enough, Appellant argued below that he was free to ignore such papers because he was required to be served with a subpoena in accordance with local state court practice. The law, however, was shown to be otherwise. See Rules 69(a), 26 and 30, FRCP, El Salto S.A. v. PSG & Co., 444 F.2d 477, 484 (9th Cir., 1971) and generally Appellee's Brief below. (R.-40) In the face of this, Appellant apparently determined not to press this argument on appeal. As shown above, the argument Appellant now advances is equally without merit.

provision, by its very terms, only refers to witnesses. Appellant is a party to this action and consequently, the statute referred to is inapplicable. Depositions of parties in aid of enforcements of judgments against them are governed by Rule 69(a) FRCP, and through said provision, Rules 26 and 30 FRCP. The deposition notice served and the order subsequently obtained were all in accordance with such provisions.

It goes without saying that a party may not flout notices or court orders merely because he disagrees with what they say or feels inconvenienced thereby. If, as Appellant contends, he felt he was entitled to travel expenses, the appropriate remedy was to move for a protective order seeking such relief. Indeed, if as Appellant contended below, it would have been inconvenient or burdensome for him to appear on the dates specified, Appellee was fully prepared to stay the application for contempt pending Appellant's appearance within a specified period and so advised the court and opposing counsel. (See Rosenthal supplemental affidavit. (A.-72)

CONCLUSION

IN LIGHT OF THE FOREGOING, IT IS RESPECTFULLY SUBMITTED THAT THE ORDERS APPEALED FROM SHOULD BE IN ALL RESPECTS AFFIRMED

Respectfully submitted,

HAVENS, WANDLESS, STITT & TIGHE

By _____
A member of the Firm

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375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

U.S. COURT OF APPEALS :::: FOR THE SECOND CIRCUIT

ALLENTOWN OFFICE BLDG, CO

VS

FRANK

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF N.Y. , ss:

ROBERT FORD being duly sworn,

deposes and says that he is over the age of 21 years and resides at 755 Hancick st BklynNY

That on the 10th day of Nov, 1975 19 at

he served the annexed brief for plaintiff-appellee upon

Bernard Hirschhorn, attorney for the plaintiff, 108-18 Queens BLvd, Forest Hills NY

in this action, by delivering to and leaving with said attorney

two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person menti ned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 10th day of NOV 1975 19

Robert K. Ford

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977